court is in complete agreement with that pronouncement except for the word 'trade' — it should be FELDA's 'business'.

The two appeals are therefore dismissed with costs.

Appeals dismissed.

Solicitors: *Ranjit, Thomas & Kula; Mohd Akhir & Partners.*

Reported by *Mathavan Devadas*

Re A Juvenile

HIGH COURT (SEREMBAN) — JUVENILE REVISION NO 43-20 OF 1990
MUSTAPHA HUSSAIN J
22 FEBRUARY 1990

Criminal Procedure — Revision — Juveniles — When a juvenile can be caned — Application of the Criminal Procedure Code to juvenile cases — Criminal Procedure Code (FMS Cap 6), s 293 — Juvenile Courts Act 1947, s 12(3)

Criminal Procedure — Administration of criminal justice — Judge can never be executioner

The juvenile in the case under review was convicted and sentenced in a juvenile court to be caned by the hearing magistrate. The magistrate personally caned the applicant eight times, exercising his powers under s 293 of the Criminal Procedure Code (FMS Cap 6) ('the Code'). The High Court called the case up for revision.

Held, that s 293 of the CPC is not applicable in this case:

(1) The sentences of punishment that can be imposed on a juvenile are contained in the Juvenile Courts Act 1947 ('the JCA'). There is no provision in the JCA providing for caning to be carried out nor by the magistrate personally.

(2) Section 293 of the Code deals with a situation where a juvenile is being charged together with an adult in an open criminal court, and cannot be applied to a juvenile court.

(3) The applicant had not been convicted in a criminal court. Juveniles are not convicted but found guilty and a juvenile court is not an open criminal court.

(4) A judge can never be the judge and executioner at the same time in a case.

Legislation referred to
Criminal Procedure Code (FMS Cap 6) s 293
Juvenile Courts Act 1947 ss 3A(5), 4(1), (5), 12(1), (2), (3)

Cur Adv Vult

Mustapha Hussain J: This is a Juvenile Revision initially called upon by this High Court on receipt of an undated and unsigned letter on 15 February 1990. Normally unsigned letters are not entertained but since the contents made allegations of illegality, where the punishment imposed, and there are a few more to be imposed, is *irreversible*, this court is bound and justified in calling for the file from the trial court to look into the allegations.

The magistrate had himself personally caned the juvenile eight times in his chambers on 14 February 1990 at the Rembau magistrate's court.

The magistrate too by his letter dated 17 February 1990 had asked for revision of the order he had made.

Juvenile cases are dealt with under the provisions of the Juvenile Courts Act 1947 ('JCA' for short). The JCA specifically provides for a separate court known as a Juvenile Court (s 4(1)) away from the ordinary open court (ie open to the public) and usually the juvenile court sits in chambers (s 3A(5)) — closed to all except the juvenile, the parents or guardians, the prosecuting officer, the two advisers and of course the magistrate (who should be a first class magistrate). If the juvenile does not admit to the charge and claims trial, then the usual witnesses involved will have to give the usual evidence. The juvenile can be represented by counsel.

The two advisers' function is to inform and advise the magistrate on matters affecting the punishment and other treatment to be imposed against the juvenile in the event the Juvenile Court makes a finding of guilt (s 4).

The words '*conviction*' and '*sentence*' cannot be used as far as juveniles are concerned. Instead the words used are '*finding of guilt*' and '*order made upon finding of guilt*' (see s 12(3)).

Only when the Juvenile Court is satisfied that an offence *has been proved* does the court have the power to impose the various forms of orders on the juvenile and/or his parents or guardians, all set out under s 12(1) and (2). Nowhere in the JCA is there any provision for caning to be carried out nor by the magistrate personally.

This juvenile, whose case is under revision now, was caned eight times by the magistrate personally. The magistrate was exercising his power under s 293 of the Criminal Procedure (FMS Cap 6) ('CPC') according to the notes of evidence.

Section 293 of the CPC reads as follows:

> (i) When any youthful offender is *convicted before any Criminal Court* of any offence punishable by fine or imprisonment, such Court may *instead of awarding any term of imprisonment in default of payment of the fine or passing a sentence of imprisonment* —
>
> (a) order ...
> (b) ...
> (c) order such offender, if a male, to be whipped with not more than ten strokes of a light cane or rattan within the Court premises and in the presence if he desires to be present, of the parent or guardian of such offender; or

(d) deal with such offender in the manner provided by the Juvenile Courts Acts, 1947.

It is quite plain and obvious, this form of punishment of whipping or caning under s 293(i)(c) of the CPC is to be made on a youthful offender who has been *'convicted before any Criminal Court'*. The words *'convicted'* and *'Criminal Court'* are quite simple, clear and incapable of being manoeuvred to include any other meaning. Nor is there room at all for interpretation. A glance at the CPC and comparing it with the JCA will clearly show the obvious difference between an open criminal court and that of the Juvenile Court. Penal terms have to be strictly constructed and interpreted and we cannot import something which is not there.

Our juvenile, the subject of this revision, was *not convicted* and the court before which he was tried was *not* a *criminal court.*

Section 293 of the CPC envisages a situation where a juvenile is being charged together with an adult in an open criminal court and he is convicted of a charge, say of robbery. Even in this instance, there is no mention or provision for the magistrate taking upon himself to execute the caning.

The saving provision of s 4(5) of the JCA of applying the provisions of the CPC cannot be invoked as the JCA did not modify or extend the applicability of s 293 of the CPC because the legislature had deliberately used the words 'Criminal Court' and the word 'convicted' in s 293 of CPC. If the words 'or Juvenile Court' had been inserted after the words 'Criminal Court' and the words 'or finding of guilt' inserted after the word 'convicted' in s 293 of the CPC, then only can s 293 of the CPC be applicable, *provided there is also an amendment to the JCA to include caning.*

It is the ruling of this High Court that s 293 of the CPC, as it now stands, cannot be applied to a Juvenile Court case. On the other hand, a criminal court can apply the provisions of the JCA in cases where a youthful offender has been convicted.

Subsection (i)(d) of s 293 of the CPC would not have been legislated specifically for the criminal court to apply the provisions of the JCA if at all s 293 of the CPC itself was already applicable to cases before the Juvenile Court.

No doubt many of the boys nowadays are vicious, violent and criminally prone and they do deserve to be caned to inculcate some sense of discipline in them. But then the provisions for such caning must be spelled out in the law in clear language. A judge cannot be the prosecutor, judge and executioner at the same time in a case. Only in rare cases of contempt of court to protect the court itself can a judge be also the prosecutor in the case. *But never the executioner* and a judge at the same time.

Even in cases where a youthful offender is convicted before a criminal court and if the magistrate is to carry out the order of caning himself, then he would have a stake in the outcome of the case. He would then have an interest in the case. If he has this interest in the outcome of the case, inevitably and invariably there will be a finding of guilt. Invariably and inevitably, there will follow the punishment of caning. He therefore cannot be said to be impartial. His findings and judgments in all cases involving juveniles will be obsessed by getting the offence proved at all costs and the sentence will always be caning and he himself carrying it out even in spite of the recommendation of the probation officer, as happened in the instant case which is the subject of this revision.

Order accordingly.

Reported by *Mathavan Devadas*

Subramaniam v Esso Malaysia Bhd

HIGH COURT (SEREMBAN) — CIVIL SUIT NO 99 OF 1981
MUSTAPHA HUSSAIN J
25 JANUARY 1990

Labour Law — Absence from work — Not self imposed — Whether contract of employment frustrated — Wrongful dismissal — Damages

Contract — Frustration — Order of detention — Whether contract of employment frustrated

Damages — Wrongful dismissal — Quantum of damages

The plaintiff, during his employment by the defendant, was placed under detention for two years under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. While under detention, the plaintiff requested that the defendant allow him to return to work after the detention. The defendant refused and instead terminated his service for failing to report for duty. The plaintiff sued for wrongful dismissal. The defendant claimed that the plaintiff's contract of employment had been frustrated by reason of his detention.

Held, allowing the plaintiff's claim:

(1) The defendant terminated the plaintiff's contract on the ground that he had been absent from work. There was no mention of frustration in their correspondence, although it was pleaded in the defence.

(2) Since the plaintiff's service was terminated on the ground of being absent from work and his absence was not self imposed, the defence of frustration could not be sustained. The plaintiff had therefore been wrongfully dismissed.

(3) The quantum of damages was confined to what the plaintiff could have earned if not for the breach of contract, up to the time he could find new employment.